(2)

Supreme Court, U.S.
FILED
AUG 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1710

In the Supreme Court of the United States

OCTOBER TERM, 1985

BELLE FOURCHE PIPELINE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE
FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM H. SATTERFIELD
General Counsel

JEROME M. FEIT
Solicitor

LESLIE J. LAWNER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

BEST AVAILABLE COPY

18 pgs

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners may not bring suit to challenge the validity of subpoenas issued by the Federal Energy Regulatory Commission, on the ground that petitioners may challenge the validity of those subpoenas in a suit brought by the Commission to enforce its subpoenas once petitioners have refused to disclose the sought-after documents.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

A.O. Smith Corp. v. *FTC*:

396 F. Supp. 1108, aff'd and rev'd in part, 530 F.2d 515 10

417 F. Supp. 1068 10

Abbott Laboratories v. *Gardner*, 387 U.S. 136 8

American Motors Corp. v. *FTC*, 601 F.2d 1329, cert. denied, 444 U.S. 941 ..... 7, 8, 9

Anheuser-Busch, Inc. v. *FTC*, 359 F.2d 487 7

Atlantic Richfield Co. v. *FTC*, 546 F.2d 646 7

Comet Electronics, Inc. v. *United States*, 381 F. Supp. 1233, aff'd, 420 U.S. 999 10

Donaldson v. *United States*, 400 U.S. 517 9

Frozen Food Express v. *United States*, 351 U.S. 40 8

FTC v. *Claire Furnance Co.*, 274 U.S. 160 7

Page

Cases—Continued:

General Finance Corp. v. *FTC*, 700 F.2d 366 7

Inexco Oil Co. v. *Belle Fourche Pipeline Co.*, 17 F.E.R.C. ¶ 61,309 3

Reisman v. *Caplin*, 375 U.S. 440 ..... 6, 7, 8, 9

SEC v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984) 9

Servitron, Inc. v. *ICC*, 380 F. Supp. 1344, aff'd, 420 U.S. 999 10

United States v. *LaJet, Inc.*, 685 F.2d 1378 7

United States v. *Miller*, 425 U.S. 435 9

Wearly v. *FTC*, 616 F.2d 662, cert. denied, 449 U.S. 822 ..... 7, 10

Constitution, statutes and regulations:

U.S. Const. Amend. IV 5

Administrative Procedure Act, 5 U.S.C. 701-702 5

Declaratory Judgment Act, 28 U.S.C. 2201-2202 5

Department of Energy Organization Act:

§ 306, 42 U.S.C. 7155 2

§ 402(b), 42 U.S.C. 7172(b) 2

§ 502, 42 U.S.C. 7192(b) 5

Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1 *et seq.* 1

Page

Constitution, statutes and regulations—Continued:

49 U.S.C. (1976 ed.) 1 2
49 U.S.C. (1976 ed.) 2 2
49 U.S.C. (1976 ed.) 3(1) 2
49 U.S.C. (1976 ed.) 6(7) 2
49 U.S.C. (1976 ed.) 12(1) 2
49 U.S.C. (1976 ed.) 12(2) 2
49 U.S.C. (1976 ed.) 12(3) 2
28 U.S.C. 1331 ..... 5, 7
28 U.S.C. 1337 ..... 5, 7
18 C.F.R. Pt. 1b 2, 4
Section 1b.10 2
Section 1b.13 2
Section 1b.14 2
Section 1b.15 2
Section 1b.20 9

Miscellaneous:

42 Fed. Reg. 55450 (1977) 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1710

BELLE FOURCHE PIPELINE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE
FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 751 F.2d 332. The opinion of the district court (Pet. App. B1-B26) is reported at 554 F. Supp. 1350.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1984. A petition for rehearing was denied on February 1, 1985 (Pet. App. C2). The petition for a writ of certiorari was filed on May 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act (ICA), 49 U.S.C. (1976 ed.) 1 *et seq.*, prohibits "common carriers," which includes oil pipelines, engaged in interstate commerce from granting a preference or a rebate to, or discriminating against, any

person using their transportation facilities. 49 U.S.C. (1976 ed.) 1, 2, 3(1), 6(7). The ICA also authorizes the Federal Energy Regulatory Commission (FERC or the Commission)[1] to conduct investigations to determine whether a common carrier has engaged in such forbidden conduct and empowers FERC to subpoena persons and documents in the course of these investigations.[2] The Commission's subpoenas are not self-executing, however. Instead, the Commission may bring an action in federal court to compel compliance with its process (49 U.S.C. (1976 ed.) 12(2); 18 C.F.R. 1b.15),[3] and the district court may order a party to appear before the Commission and give testimony or produce the subpoenaed documents (49 U.S.C. (1976 ed.) 12(3)).

---

[1]The Interstate Commerce Commission originally had jurisdiction over oil pipelines engaged in interstate commerce, but Congress transferred that regulatory authority to the FERC and the Secretary of Energy in 1977. The Secretary has delegated much of his authority to FERC. Sections 306 and 402(b) of the Department of Energy Organization Act, 42 U.S.C. 7155 and 7172(b); 42 Fed. Reg. 55450 (1977).

[2]Under Section 12(1)(a) of the ICA, 49 U.S.C. (1976 ed.) 12(1)(a), the Commission is required to "execute and enforce" the provisions of the ICA and has broad authority "to inquire into * * * the management of the business of all common carriers subject to the [ICA], and * * * of persons controlling, controlled by, or under common control with, such carriers * * *." Incident to this mandate, the Commission has the power "to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." *Ibid.*; see also 18 C.F.R. 1b.13, 1b.14.

[3]FERC's rules covering investigations of oil pipeline matters under the ICA are found at 18 C.F.R. Pt. 1b. Among other things, these rules authorize an investigating officer of the Commission to issue subpoenas (18 C.F.R. 1b.10, 1b.13) and authorize the Commission to initiate "appropriate action" to compel compliance with its process (18 C.F.R. 1b.15).

2. a. Petitioner Belle Fourche and its affiliates[4] operate an oil transportation system in Montana, North Dakota, and Wyoming (Pet. App. A2; R. 298).[5] One part of the system is a pipeline located entirely in Wyoming that Belle Fourche operates as a common carrier (*ibid.*; R. 298). The Wyoming pipeline delivers oil to several other pipelines that, in turn, transport oil from Wyoming to other states (*ibid.*; 5/13/83 Tr. 37, 40, 74-75, 138). Significant volumes of oil shipped over Belle Fourche's Wyoming system are either themselves transported outside of Wyoming by these pipelines or are exchanged for equivalent volumes of oil which are delivered out of state (5/13/83 Tr. 74-75, 153, 157, 168, 171, 176-177, 257, 277). At all times relevant to this case, Belle Fourche has had tariffs on file with FERC covering its Wyoming services (5/13/83 Tr. 40-41).

In 1973, the Interstate Commerce Commission (ICC) began a public investigation of the practices of Belle Fourche and its affiliates after Inexco Oil Co., an independent shipper, had filed a complaint with the ICC.[6] The investigation was later transferred to FERC (see page 2 note 1, *supra*). In late 1981, FERC granted Inexco's request to

---

[4]The affiliates, who are also petitioners in this case, are as follows: Eighty-Eight Oil Company is the main shipper on the Belle Fourche line. Equitable Oil Purchasing Co. operates a gravity bank for the line, which compensates or charges the participating shippers for the different gravity values of their oil once it is injected into the line and mixed with oil of other value (see Pet. App. A2 n.2). Black Hills Trucking, Inc., is a common carrier trucking company that delivers oil from the wellhead to Belle Fourche for further transportation. Other petitioners, J. Frank Pottorff (now deceased) and H. A. True, Jr., were principals in the Belle Fourche companies (Pet. 1).

[5]The citations to the record are taken from the government's brief in the court of appeals.

[6]See *Inexco Oil Co.* v. *Belle Fourche Pipeline Co.*, 17 F.E.R.C. ¶ 61,309 (1980) (Order Terminating Proceedings).

withdraw its compiaint against Belle Fourche and terminated the public proceeding. However, FERC also decided to conduct a private investigation of Belle Fourche. See 18 C.F.R. Pt. 1b.

Shortly after the investigation began, the Commission issued four subpoenas to the principals of Belle Fourche, Eighty-Eight, Equitable, and Black Hills (5/13/83 Tr. 192-193).[7] These subpoenas related solely to Belle Fourche's oil pipeline system and its affiliated components. The Commission also issued subpoenas to oil pipeline companies which do business with Belle Fourche.[8]

b. After first allowing the Commission's officials to copy some of the subpoenaed documents,[9] petitioners filed a complaint in the United States District Court for the District of Wyoming seeking an injunction restraining any

---

[7]A fifth was issued to a principal of True Oil Purchasing Company, which had been merged into Eighty-Eight. Gov't C.A. Br. 6 n.6.

[8]Thirteen subpoenas were served in 1982 upon shippers who used Belle Fourche's Wyoming pipeline, and all 13 shippers responded to the subpoenas. Fifteen additional subpoenas were served in mid-1982 upon other shippers; the response dates to these subpoenas were indefinitely extended pending the outcome of this suit. Six subpoenas served upon connecting oil pipelines were also indefinitely extended pending the resolution of this suit.

[9]In order to expedite the investigation, Commission officials indefinitely extended the return date on the subpoenas, agreed to examine the documents at petitioners' offices in Wyoming, rather than require petitioners to incur the expense of producing the documents at the Commission's headquarters in Washington, D.C., and agreed to perform and pay for the necessary copying (R. 62-67; 5/13/83 Tr. 94-95, 192-193). The Commission's attorneys copied approximately 6,000 pages of documents during their first visit (5/13/83 Tr. 57). During a second visit, petitioners told the Commission officials that petitioners intended to file a complaint in district court seeking declaratory and injunctive relief against the Commission's investigation (Gov't C.A. Br. 7). The Commission officials then left the premises without taking the additional documents that they had copied on that trip (*ibid.*). Petitioners thus err in asserting (Pet. 14) that the Commission has 13,000 documents of theirs.

further investigation by FERC (Pet. App. A2, B1-B2). Petitioners claimed that they were not subject to the jurisdiction of FERC under the ICA because the Wyoming pipeline operated only in intrastate commerce (*id.* at A2, B3). In their complaint, petitioners alleged that the district court had jurisdiction under the Department of Energy Organization Act, 42 U.S.C. 7192(b), the Administrative Procedure Act, 5 U.S.C. 701-702, and the Declaratory Judgment Act, 28 U.S.C. 2201-2202 (Pet. App. A2-A3, B3). The district court issued a temporary restraining order against any further investigation of petitioners by FERC (R. 30-31; see Pet. App. A3), but the court thereafter dismissed petitioners' complaint on the ground that none of these statutes gave the court subject matter jurisdiction over petitioners' claims (see Pet. App. B3). After petitioners amended their complaint to allege jurisdiction under 28 U.S.C. 1331 and 1337, the court consolidated the hearing on petitioners' request for a preliminary injunction with the trial on the merits of petitioners' complaint (Pet. App. B3; 5/13/83 Tr. 5). Following that hearing, the court issued an opinion and an order permanently enjoining the Commission from attempting to enforce its subpoenas (Pet. App. B1-B26).

The court first held that it had subject matter jurisdiction over petitioners' complaint under 28 U.S.C. 1331 and 1337, on the ground that the complaint raised questions under the ICA and the Fourth Amendment (Pet. App. B3-B10). The court rejected (*id.* at B9) the Commission's argument that petitioners were not entitled to obtain preenforcement judicial review of the validity of its subpoenas, on the ground that that argument "elevates form over substance," given the Commission's vigorous defense of its investigation. On the merits, the court found that the Wyoming pipeline was wholly within intrastate commerce and therefore was not subject to the Commission's jurisdiction (*id.* at B10-B15).

The court enjoined the Commission from attempting to enforce its subpoenas but refused to enjoin the Commission from investigating petitioners, on the ground that the Commission's "investigation is in pursuit of a clearly lawful purpose" (*id.* at B22) in that "FERC has initiated an investigation into possible violations of the I.C.A. which would have an impact on interstate commerce" (*id.* at B20).

c. The court of appeals reversed the district court's order and vacated the injunction (Pet. App. A1-A6). Relying chiefly on *Reisman* v. *Caplin*, 375 U.S. 440 (1964), which the court of appeals found to be "strikingly similar" to this case (Pet. App. A5), the court held that the district court should not have decided whether the Commission's subpoenas were valid because petitioners had an adequate legal remedy for challenging the validity of the subpoenas in a subsequent enforcement proceeding (*id.* at A5-A6). The proper response for petitioners, the court held, was to refuse to comply with the subpoenas, which would have required the Commission to initiate enforcement proceedings, at which petitioners could then present their defenses (*id.* at A5). The court also rejected petitioners' argument that the district court had jurisdiction at this stage of the proceedings because the Commission had counterclaimed for enforcement of its subpoenas (*id.* at A6). The court held that the Commission had simply objected to the district court's exercise of jurisdiction and had not specifically counterclaimed for enforcement of its subpoenas (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Contrary to petitioners' contentions (Pet. 9-14), it is well settled that the respondent to an administrative subpoena may not challenge the validity of that subpoena in district

court under 28 U.S.C. 1331 or 1337 where he has an adequate remedy in the subpoena enforcement proceedings brought by the agency to compel compliance with its process. See, *e.g.*, *Reisman* v. *Caplin*, 375 U.S. 440, 446-450 (1964); *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174-175 (1927); *General Finance Corp.* v. *FTC*, 700 F.2d 366, 368 (7th Cir. 1983); *United States* v. *LaJet, Inc.*, 685 F.2d 1378, 1382 (Temp. Emer. Ct. App. 1982); *Wearly* v. *FTC*, 616 F.2d 662, 665 (3d Cir.), cert. denied, 449 U.S. 822 (1980); *American Motors Corp.* v. *FTC*, 601 F.2d 1329, 1332-1337 (6th Cir.), cert. denied, 444 U.S. 941 (1979); *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 649-650 (5th Cir. 1977); *Anheuser-Busch, Inc.* v. *FTC*, 359 F.2d 487 (8th Cir. 1966) (Blackmun, J.). Preenforcement actions to invalidate an agency's subpoena such as this have traditionally been rejected where "the remedy specified by Congress works no injustice and suffers no constitutional invalidity [and] * * * provides full opportunity for judicial review before any coercive sanctions may be imposed" (*Reisman* v. *Caplin*, 375 U.S. at 450). In such circumstances, a party "may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court under [28 U.S.C.] 1331 or 1337; the specific statutory method, if adequate, is exclusive" (*General Finance Corp.* v. *FTC*, 700 F.2d at 368).

The court of appeals correctly observed (Pet. App. A5) that this case is "strikingly similar" to *Reisman* v. *Caplin, supra*. There, the Internal Revenue Service (IRS) had subpoenaed a couple's financial records and related information from their accountants, and the couple's attorneys sought declaratory and injunctive relief against the IRS on the ground that the subpoenas sought the production of privileged information. 375 U.S. at 442. The Court held that the plaintiffs could not obtain a preenforcement order

enjoining the IRS from issuing its subpoenas, on the ground that the plaintiffs could present any defenses to the subpoenas without suffering any penalty and could obtain complete relief in an enforcement proceeding brought by the IRS to compel the accountants to produce the subpoenaed materials. *Id.* at 445-450. Here, as in *Reisman*, petitioners are in no present danger of suffering any sanction for a good faith refusal to withhold the subpoenaed documents. Furthermore, the statutory procedure authorizing the Commission to enforce its subpoenas, as the court of appeals observed (Pet. App. A5), is "virtually identical" to the procedure considered in *Reisman*. Compare 375 U.S. at 445-446, with pages 1-2, *supra*. Because the Commission's subpoenas are not self-enforcing, petitioners can present their defenses to the Commission's subpoenas, including their claim that FERC lacks jurisdiction over their operations, in an enforcement proceeding brought by the Commission to compel petitioners to turn over the subpoenaed documents. Alternatively, if the Commission does not seek to enforce its subpoenas, petitioners can raise their jurisdictional claims if FERC ultimately finds that petitioners have violated the ICA. Accordingly, petitioners are mistaken in claiming (Pet. 9) that they are "powerless" to obtain a judicial determination of FERC's jurisdiction over them; they simply must wait until such time as that question is properly raised.[10]

---

[10]Because petitioners will suffer no prejudice from raising their claims in the context of an enforcement proceeding (see, *e.g.*, *American Motors Corp.* v. *FTC*, 601 F.2d at 1338), the court of appeals correctly held (Pet. App. A5-A6) that petitioners could not demonstrate the immediacy of injury necessary to meet the test of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967). In contrast to the situation in that case and in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), upon which petitioners also rely (Pet. 12), here petitioners are subject to no penalties or other sanctions in advance of judicial enforcement proceedings. Finally, any alleged intra-circuit conflict

Petitioners argue (Pet. 9) that an enforcement proceeding does not provide an adequate remedy because they will suffer substantial injury from FERC's public disclosure of "trade secrets and confidential customer information" before any such proceeding takes place.[11] That claim is not well founded and is premature, however. Petitioners can ask the Commission to hold in confidence any information that they submit to the Commission. See 18 C.F.R. 1b.20. Alternatively, petitioners may refuse to divulge any allegedly confidential information and thereby force the Commission to initiate enforcement proceedings to obtain the documents in question. Petitioners may then assert any applicable privileges at that proceeding. See *Reisman* v. *Caplin*, 375 U.S. at 449; *American Motors Corp.* v. *FTC*, 601 F.2d at 1338-1339. In the meantime, as the court of appeals noted (Pet App. A6), because petitioners will suffer no penalty for their good faith noncompliance with the Commission's subpoenas, there is no legally cognizable "risk" that petitioners will be damaged by the court of

---

between the Tenth Circuit's decision in this case and the other Tenth Circuit decisions cited by petitioners (Pet. 13, 19) is for the Tenth Circuit, not this Court, to resolve.

[11]Petitioners also suggest (Pet. 10) that they will be harmed by the seizure of documents from unaffiliated third parties. However, this Court has never held that the subject of an agency's investigation may obtain a restraining order preventing voluntary compliance by a third-party with an administrative subpoena. See *SEC* v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984), slip op. 12. In any event, petitioners have failed to establish that the materials sought by the Commission's subpoenas consist of anything other than "routine business records in which the [petitioners] ha[ve] no proprietary interest of any kind * * * and which enjoy no established * * * privilege" (*Donaldson* v. *United States*, 400 U.S. 517, 530 (1971)). Indeed, the gravamen of petitioners' claim is that the FERC lacks jurisdiction over their business, not that the Commission has sought privileged information. Petitioners also enjoy no general privacy interest in documents that they have voluntarily transferred to third parties. See, *e.g.*, *United States* v. *Miller*, 425 U.S. 435 (1976).

appeals' ruling.[12] Accordingly, the controversy remains to be honed in further proceedings and review by this Court of the present decision is not warranted.[13]

---

[12]Petitioners erroneously assert (Pet. 19) that *A.O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108 (D. Del. 1975), aff'd and rev'd in part, 530 F.2d 515 (3d Cir. 1976), and *A.O. Smith Corp.* v. *FTC*, 417 F. Supp. 1068 (D. Del. 1976), support their claim that the district court could properly consider the merits of their complaint before the Commission brought an enforcement action. As the Third Circuit has since explained, *A.O. Smith* did not involve a challenge to an agency's issuance of a subpoena in the course of an investigation. Rather, that case involved an FTC resolution that required certain parties to submit extensive financial accounting data and that imposed substantial penalties for noncompliance. The Third Circuit held that the *Abbott Laboratories* criteria were met because the agency's action was final, the plaintiff would have incurred considerable expense in obeying the regulations, and the plaintiff was faced with stiff penalties for noncompliance. *Wearly* v. *FTC*, 616 F.2d at 666. No similar concerns exist here.

Petitioners also mistakenly rely (Pet. 19) upon *Servitron, Inc.* v. *ICC*, 380 F. Supp. 1344 (M.D. La. 1974), aff'd, 420 U.S. 999 (1975), and *Comet Electronics, Inc.* v. *United States*, 381 F. Supp. 1233 (W.D. Mo. 1974), aff'd, 420 U.S. 999 (1975). The court of appeals correctly observed (Pet. App. A6) that in those cases, unlike this one, the agency counterclaimed in the district court for enforcement of its subpoenas. Petitioners' fact-bound claim (Pet. 16-18) that FERC counterclaimed at trial for enforcement of its subpoenas was properly rejected by the court of appeals (Pet. App. A6) and does not warrant review by this Court.

[13]We also note that petitioners improperly cite (Pet. 4, 5, 8, 15) an internal Commission memorandum recommending that the Commission direct its staff to conduct a nonpublic investigation of Belle Fourche Pipeline Company and others. This memorandum was submitted to the district court for its in camera inspection at the hearing in this case. That court placed the memorandum under seal, but sent the memorandum to the court of appeals with the record of the case. Through a clerical error, the court of appeals sent a copy of the memorandum to Belle Fourche subject to a protective order prohibiting the memorandum from being copied or disclosed to anyone other than the attorneys representing petitioners. On the Commission's motion, the court of appeals later ordered Belle Fourche to return all copies of the memorandum. The court ruled that the memorandum would remain

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

WILLIAM H. SATTERFIELD
General Counsel

JEROME M. FEIT
Solicitor

LESLIE J. LAWNER
Attorney
Federal Energy Regulatory Commission

AUGUST 1985

---

under seal and would not be disclosed without a further order of the court. The Commission maintains that this information is confidential and privileged, as well as wholly irrelevant to the issues on appeal.

DOJ-1985-08